that the presumption of 'occupier' did not apply to the accused, the presumption of knowledge of the concealment of the drugs under section 37(g) did not arise either.

Thirdly, the quantities of drugs found were insufficient to raise the presumption of trafficking under section 37(da):

Drug	*Found in premises*	*Minimum Quantity under section 37(da)*
Morphine	86.3 grammes	100 grammes
Chandu	550.8 grammes	1000 grammes
Chandu dross	121.6 grammes	1000 grammes

It was this fact that led to the amendment of the alleged offence. I pause here to observe that there is no change in the quantities found by the police and at the trial. This fact was known to the prosecution throughout and certainly to the Public Prosecutor when he signed the consent on November 25, 1976. The evidence did not disclose any fact of trafficking as defined in section 2 other than that of concealment. As the evidence stood it was insufficient to support a charge under section 39B(1)(a).

Turning now to the amended charge. Packing drugs in small packets is preparatory to trafficking within the meaning of section 39B(1)(c) but there was no evidence that the accused packed these drugs or that she had anything to do with them.

The drugs were certainly concealed under the kitchen at TBG 1306 Jalan Harper. Who concealed the drugs there? I found as a fact that the accused did not.

Solicitors: *Radzi bin Tan Sri Sheikh Ahmad.*

SOUTH EAST ASIA BRICKWORKS SDN. BHD. v. MARIA ANTONETTE

[A.C.J. (Abdul Hamid J.) June 14, 1974]
[Kuala Lumpur — Civil Appeal No. 2 of 1974]

Contract — Building contract — Agreement for sale of house — Refusal of purchaser to accept key on ground that "municipal authorities had not yet granted certificate of fitness for occupation" — Whether reasonable.

Housing Developers — House ready for occupation — No certificate of fitness — Whether purchaser's refusal to accept key reasonable.

The appellants were housing developers. By a standard form of agreement they sold one of the houses to the respondent. When the house was ready for occupation the respondent refused to accept the keys on the ground that the municipal authorities had not yet granted the appellants a certificate of fitness for occupation. She then sued the appellants in the Magistrate's Court for damages for delay and succeeded. The appellants appealed.

Held: the respondent's contention that the house must not only be completed in the sense that it was fit for human habitation but must also be equipped with a certificate of fitness for occupation was unreasonable. The court would refuse to import a further term into the agreement.

The following authorities were cited in argument: *Key & Elphinstone:* Conveyancing Precedents 9th Edn. Vol. I; *Halsbury's* Laws of England, 3rd Edn., Vol. 8, *Lewis* v. *Hoare* 44 L.T. 66; *Miller* v. *Cannon Hill Estates* [1931] 2 K.B. 113; *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.* [1935] A.C. 524; *Herne Bay Steam Boat Co.* v. *Hutton* [1903] 2 K.B. 683.

CIVIL APPEAL.

Lim Kean Chye and *Tan Bu Kian* for the appellants.

Respondent in person.

Abdul Hamid J. (delivering oral judgment): The dispute in this case arises on account of the construction placed by the parties in regard to the term "completion" used in Clause 2 of the agreement. Clause 2 reads as follows: —

"The purchaser shall pay to the company the balance of the said purchase price of $14,500 on completion of the house to be notified by the company."

The respondents' contention is that not only must the house be completed in the sense that it is fit for human habitation but must also be equipped with a certificate of fitness for occupation.

Primarily the court is to determine the meaning that may reasonably be assigned to the word used. In doing so the court should construe it within the four corners of the agreement.

In the light of the various stipulations contained in the agreement I am of the view that it is unreasonable to construe the word in the manner urged upon me by the respondent. This would amount to importing a further term namely, completion on satisfaction endorsed by the City Architect issuing a certificate of fitness for occupation. To do so would in effect, be importing a term which was not within the contemplation of the parties and would have the effect of frustrating the contract.

For this reason I will allow the appeal with costs. The order of the Magistrate is hereby set aside.

Appeal allowed.

Solicitors: *Sothi & Ang.*

R & I SECURITIES SDN. v. GOLDEN CASTLE FINANCE CORPORATION (M) BHD.

[O.C.J. (Syed Othman J.) December 31, 1977]
[Johore Bahru — Originating Summons No. 171 of 1977]

Land Law — Charge —Land already charged — Refusal to give consent to second charge — Caveat lodged — Application to extend — Provision in first charge disallowing creation of further charges without consent of first chargee — National Land Code 1965, ss. 241, 323(1)(a) & 326(2).

The applicants sought for the extension of the caveat registered against a piece of land until the civil suit filed by them against the registered proprietors, *M. Bhd.* had been finally disposed of, or until the payment of security by *M. Bhd.*, or until the respondents had obtained an order for sale. *M. Bhd.* had charged the title to the applicant on December 2, 1975 as a collateral security against *H. Ltd.* paying for shares valued at $1,999,570.25 which they had contracted to purchase. The respondents to whom title had already been charged, refused to give their consent to the second charge. As the second charge had not been registered the applicants entered a caveat.

The respondents deposed that *M.* charged the land to the respondents to secure repayment of a loan and under Clause 6 of the charge consent of the respondent must be obtained first before any further security or encumbrance could be executed over the land.

Held: the registered proprietors had by Clause 6 of the first charge at their own instance disabled themselves from creating further charges without consent of the first chargee. The applicants were aware of the restrictions and in the circumstances the application must be dismissed.

Cases referred to:-

(1) *Inter-Continental Mining Sdn. Bhd.* v. *Societe Des Etains De Bayas Tudjuh* [1974] 1 M.L.J. 145.

(2) *Chin Cheng Hong* v. *Hameed & Ors.* [1954] M.L.J. 169.

ORIGINATING SUMMONS.

Upali Masacorale for the applicants.

K. Thayalan for the respondents.

Cur. Adv. Vult.

Syed Othman J.: The applicants here seek that the caveat entered by them on Grant No. 19238 Lot No. 4532 in the Mukim of Simpang Kanan, Johor, be extended until civil suit filed by them against the registered proprietors, Malaysian Woodwool Products Bnd., is finally disposed of, or until the registered proprietors pay up the amount of security or provide an alternative security, or until the respondents have obtained an order for sale. In the affidavit accompanying the application, a director of the applicants deposes that Malaysian Woodwool charged the title to the applicants on December 2, 1975 as a collateral security against Hong Kong Securities Ltd. paying for shares valued at $1,999,570.27 which they had contracted to purchase; the respondents, to whom the title had already been charged, refused to give their consent to the second charge; as the second charge could not be registered, the applicants entered a caveat; Hong Kong Securities have not paid for the shares; on April 9, 1977, the applicants received a letter from respondents demanding that the caveat be removed; the applicants' solicitors replied informing respondents' solicitors to the effect that the applicants are amenable to lifting the caveat so long as their interests were not affected by a premature removal of the caveat and undertook to remove the caveat at the appropriate time without interfering with the respondents' claim to priority; removal of the caveat at the juncture, would not protect the applicants' interest; the applicants have brought an action against Malaysian Woodwool claiming the amount of security given under the charge; on June 16, 1977, the Collector of Land Revenue, Johor Bahru, at the instance of the respondents issued notice in Form 16C National Land Code requiring the applicants to remove the caveat.

By an affidavit in reply, the Assistant Manager of the respondents, deposes that Malaysian Woodwool charged the land to the respondents to secure repayment of a $700,000 loan and interest thereon at the rate of 12%; under clause 6 of the charge, consent of the respondents must be obtained first before any further security or encumbrance could be executed over the land; the applicants were aware of this condition, as they wrote to the respondents for consent which was refused.

For the applicants, Encik Upali Masacorale has urged that the caveat should be extended as the applicants are not claiming priority, but merely seeking protection of their interests as created by the "second charge", and by this instrument the applicants must be said to have an equitable interest. He relies on *Inter-Continental Mining Sdn. Bhd.* v. *Societe Des Etains De Bayas Tudjuh*[1] where the facts of the case as in the headnote read: —

"In this case the appellants had obtained a permit to mining land, of which the respondents were the lessees. Owing to heavy loses sustained in the mining operations it was mutually agreed that the land should be given to a third party to work on a sublease on payment of a premium. The respondents negotiated with a third party and offered them option for sublease. There were differences of opinions between the appellants and the respondents as to the terms of the offer to the third party and in order to protect their rights under their agreement with the respondents the appellants lodged a caveat against the land. There respondents applied for an order to remove the caveat and the application was granted by the High Court. The appellants appealed to the Federal Court."

In dealing with the case, the Federal Court referred to several authorities. But for the purpose of the present matter, the decision of the Court of Appeal in *Chin Cheng Hong* v. *Hameed & Ors.*[2] sets out the applicable principle. At page 170 Buhagiar J. said: —

"... The whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests in land, but a caveat, being in the nature of a statutory injunction, does not in itself make a claim or right better or worse."

Coming back to *Inter-Continental Mining case, supra,* Gill F.J. (as he then was) at page 148 said:

"Applying the principles enunciated in the above cases to the facts of the present case it would seem clear that if the agreement is in substance a sublease, though not in the required statutory form, equity will treat it as an agreement for a sublease and specifically enforce it, in which case the appellants have a right in equity to a registrable interest in land, so that they are entitled to lodge a caveat under section 323(1)(a) of the National Land Code."

Encik Thayalan, for the respondents, argues that the caveat cannot stay as Malaysian Woodwool have deprived themselves of a legal right when they agreed to clause 6 of the agreement under the first charge. This clause reads:

"6. The chargor shall not throughout the duration of this charge transfer sell charge lease or otherwise deal with the land hereby charged without the written consent of the Chargee first had and obtained."

Reference is made to subsections (2) and (3)(a) of section 241 of the National Land Code. He further argues that the second charge is not in fact a charge, and at the most it is an agreement which purports to be a charge. The material part of the instrument as appearing in paragraph 2 reads: —

"(i) In consideration of the Chargee at out request and inducement having agreed to sell to Hong Kong Securities Limited:—

(a) 1,100,000 shares in Mosbert Berhad for the total purchase price of M$752,735 which was due and payable by Hong Kong Securities Limited to R & I Securities (Sdn.) on November 28, 1975.

(b) 1,250,667 shares in Mosbert Berhad for the total purchase price of US$422,925.92 — M$1,151,581.392 (agreed conversion) which was due and payable by Hong Kong Securities Limited to R & I Securities (Sdn.) on October 10, 1975.

(c) 120,000 shares in Town & City Properties Limited for the total purchase price of US$75,093.80 — M$195,243.880 (agreed conversion) which was due and payable by Hong Kong Securities Limited to R & I Securities (Sdn.) on October 30, 1975.

(ii) In further consideration of the sum of M$1 only now paid by R & I Securities (Sdn.) to Malaysian Woodwool Products Berhad, the receipt of which is hereby acknowledged:

We, hereby Charge the land together with building thereon held under document of title known as Grant No. 19238 Lot No. 4532 in the Mukim of Simpang Kanan with the payment by Hong Kong Securities Limited of the sum of M$1,999,570.27 together with all interests thereon and in addition thereto for all others sums that may be due from Hong Kong Securities Limited and or the Chargor to the Chargee including registration fees stamp duties and Solicitors fees."

The instrument bears some signatures, but is unstamped. The consideration I find is somewhat odd. For underwriting such a big sum, Malaysian Woodwool charged a charged land and obtained only $1 from the applicants. Looking at the transaction as a whole, I cannot help feeling that there is more than what is shown on the surface. Malaysian Woodwool must be related to Mosbert Bhd. which is now under liquidation.

I agree with the submission for the respondents that the instrument cannot be treated as a charge. It is, I find, a device to put the applicants in the position of a secured creditor ranking second to the respondents. I doubt if the applicants can be so, as the instrument is not a charge.

The next question is whether clause 6 of the existing charge at law disables the registered proprietor from further dealing with the land without the consent of the chargee.

Section 241 of National Land Code giving the registered proprietor power to charge his land, reads: —

"241. (1) Subject to subsection (3), any alienated land or lease thereof (but not a part of the land alienated or leased) may be charged under this Act with —

(a) the repayment of any debt, or the payment of any sum other than a debt; or

(b) the payment of any annuity or other periodic sum.

(2) The powers conferred by sub-section (1) shall include power to create second and subsequent charges.

(3) The said powers shall be exercisable in any particular case subject to —

(a) any prohibition or limitation imposed by this Act or any other written law for the time being in force."

Paragraphs (b) and (c) and subsection (4) do not apply.

Subsection (1) enables any alienated land to be charged for repayment of debts etc. By subsection (2) the powers in subsection (1) shall include power to create second and subsequent charges. And, by subsection (3)(a) the powers shall be exercisable subject to any prohibition or limitation imposed by this Act or any written law. I shall not concern myself with the other paragraphs as they do not seem to apply here. No doubt subsection (3)(a) relates to prohibition or limitation under a written law. But the power derived by the registered proprietor under subsection (1), I would consider, is merely permissive, in view of the word "may". By this provision it is a matter for the registered proprietor whether or not to exercise it. Having regard to the nature of the power derived, I am of the view, that the registered proprietor may disqualify or preclude himself from exercising it by a registrable instrument. If he does so, then he puts himself under a legal disability, and he cannot avail himself of the right to create other charges. In the present case, I find that the registered proprietors have by clause 6 of the first charge at their own instance disabled themselves from creating further charges without consent of the first chargee.

In any case, the power of court to extend the life of a caveat is discretionary. Section 326(2) reads:—

"The court may, on the application of any person or body on whom such notice has been served (and acting, if the circumstances so require, *ex parte*), from time to time extend the period of one month. . . ."

The notice referred to is the notice of removal of a caveat by the Collector.

As Gill F.J. (as he then was) said in the *Inter-Continental Mining case*, the applicants must have a right in equity to a registrable interest. On the instrument presented to the court in the present case I doubt if the applicant has such right. Apart from this, when the instrument was created on December 2, 1975 Malaysian Woodwool, the applicants themselves ignored the restriction under the first charge. In their letter to the respondents, as per Exhibit "R & I 3", Malaysian Woodwool at first merely asked for the release of title to the land. Then on December 4, 1975, *vide* Exhibit "R & I 4" through the solicitors, they sought consent. From this and in the absence of any explanation, I find that Malaysian Woodwool was presenting the respondents with a *fait accompli*. Clause 6 is clear. Consent must be obtained before the creation of another charge. The applicants were aware of the restriction. Indeed, I find that they have subscribed to the breach of the restriction. Considering all this, I do not think I should exercise my discretion in extending the caveat. In any case, I find that the applicants have other remedies. For the foregoing reasons, I hereby order that the caveat be removed. Costs to the respondent.

Order accordingly.

Solicitors: *Jackson & Masacorale; Skrine & Co.*